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No. 84-861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION TO SUBMIT BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA PARTIALLY IN SUPPORT OF THE PETITIONER

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36.3 of the rules of this Court, the Chamber of Commerce of the United States of America ("the Chamber") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* urging reversal of the decision of the Court of Appeals. In support of this motion, the Chamber shows as follows:

1. This motion is necessitated by the refusal of the International Longshoremen's Association, AFL-CIO, and the New York Shipping Association, Inc. to consent to the filing of a brief *amicus curiae* by the Chamber.

2. The Chamber is a federation consisting of approximately 180,000 companies, plus several thousand other organizations such as chambers of commerce and trade/professional associations. It is the largest association of business and professional organizations in the United States.

3. The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation, including, for example, *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976); *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974); *NLRB v. Bell Aerospace Co. Division of Textron, Inc.*, 416 U.S. 267 (1974).

4. This case presents the issue of how far unions may go in seeking to capture work to replace work lost to their members through technological innovation. Specifically, the Court must decide whether the International Longshoremen's Association ("ILA") may lawfully pressure steamship companies and stevedoring companies to disrupt their established business relationships with shippers and land surface transportation and freight-handling companies to force the latter to have certain aspects of their customary freight-handling operations performed by ILA labor at shipping docks and piers.

5. The issues in this case are of vital interest to Chamber members for at least two reasons. First, as consumers (i.e., shippers and consignees) in industries relating to the shipment of freight involving overseas transport, Chamber members are legitimately concerned that their historic ability to select the most economical and sensible means of freight shipment will be significantly hindered if the appellate court's decision is affirmed. Second, many members of the Chamber now have collective bargaining agreements with unions and virtually all members have extensive business dealings with other unionized employers. As a consequence, Chamber members may themselves be the direct or indirect objects of union pressures to modify their business arrangements in order to serve purported goals of "work preservation." Accordingly, the standards of permissible union conduct established in this case will have significant impact on Chamber members and other employers throughout the United States.

WHEREFORE, the Chamber respectfully requests that it be granted leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE *AMICUS CURIAE*

A statement describing the Chamber of Commerce of the United States of America ("the Chamber") and its interest in this case is set forth in the foregoing motion requesting leave to file this brief.

STATEMENT OF THE CASE

A. Procedural Background

This case involves the legality, under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act

("the Act"), of the Rules on Containers ("Rules") negotiated by the International Longshoremen's Association ("ILA") and employer organizations representing various shipping and stevedoring companies ("steamship companies") that employ ILA members. On remand from this Court's decision in *NLRB v. International Longshoremen's Association*, 447 U.S. 490 (1980) (*"ILA-I"*), the National Labor Relations Board ("NLRB" or "the Board") held that the Rules were lawful in some respects and unlawful in other respects (266 NLRB 230). On review in 1984, the Fourth Circuit held that the Rules were lawful in all respects (734 F.2d 966). It is that judgment of the Fourth Circuit that is presently pending before this Court.

B. Background of Dispute

The genesis of the instant dispute was the development of containerization technology in the freight transportation industry. Because modern containers can be attached directly to truck chassis for overland transport and loaded into the holds of container ships for overseas transport, they can be "stuffed" (loaded with cargo) or "stripped" (discharged of cargo) at inland locations without individual pieces of cargo ("break bulk" cargo) ever being handled on the piers.

For years the steamship companies have leased these containers to shippers, warehouses, consolidators and trucking companies who stuff and strip them at locations away from the pier based upon instructions from the shipper or its agent. Specifically, when beneficial owners of cargo (shippers) decide to ship goods overseas, they or their agents issue instructions (normally through a bill of lading) specifying the method by which the containerized cargo is to be transported (both overland and overseas) as well as where and by whom the container will be stripped and stuffed. Those instructions normally

direct the steamship company simply to load or unload the sealed container on or off a ship.[1]

As a consequence of this technology, much of the traditional longshoremen's loading and unloading of break bulk cargo has been rendered unnecessary. In response to this erosion of longshore work, the ILA has sought to restrict the release of containers by bargaining the "Rules on Containers" with steamship companies that employ its members.

C. Evolution of Containerization and the Rules On Containers

Although the ILA's Rules restricting the use of containers are relatively new, containerization is not a new phenomenon. For years ocean-going cargo has been prepackaged in various forms, including, for example, the use of special vessels to carry railroad cars intact without pier-side handling of their contents (266 NLRB at 244). Further, in the late 1940s steamship companies began using "Conex" or "Dravo" boxes, the immediate precursors of the modern container. Although ILA labor initially stuffed and stripped these boxes at the pier, steamship companies later released these boxes to shippers for off-shore stuffing and stripping by non-ILA labor. In all of these cases, this pre-packaged cargo was allowed to cross the docks unimpeded and unhandled by ILA labor (*id.*). In other words, the longshoremen historically loaded and unloaded ship cargo as they found it, whether break bulk or pre-packaged.

By the late 1950s, however, the larger, present-day containers were in use (*id.*) and the ILA saw them as a clear threat to the work of its members (734 F.2d at 969). For example, in a 1959 report to the Union's 39th

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[1] See Joint Appendix, pp. 10-11, 20, 36, 62, 69-70, 74-75, 77-79, 91-92, 101-102, 118, 123-124, 131, 137-138, 142-143, 144, 145, 192-193, 196-197. See also 266 NLRB at 261.

convention, ILA official Thomas W. Gleason noted that the effects of containerization on the union membership would be tremendous and that the ILA stood to lose up to 9,000 jobs in the New York port alone, as well as a proportionate number in other ports (i.e., 30% of its membership). Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 Lab. L.J. 397, 401 (1970).

The ILA's response was to demand, in 1959 master contract negotiations with the steamship companies, that all containers be stripped and stuffed on the pier by dockside ILA labor (266 NLRB at 244). However, the resulting agreement gave the steamship companies the right "to use any and all types of containers without restriction or stripping by the Union" (266 NLRB at 244, 277). In exchange, the steamship companies agreed to pay a royalty to ILA welfare funds for each container passing over the piers intact (i.e., without being stripped or stuffed).[2]

During the term of that 1959 contract, the ILA claimed that the container clause did not give the steamship companies any rights with respect to "LCL containers" (266 NLRB at 241, 245).[3] Although that proposition was doubtful under the contract language, in 1962 the steamship companies agreed to impose the first restriction on off-shore consolidation of LCL containers by stating that when a shipping company supplied a container to a con-

[2] The steamship companies also agreed that longshore labor would perform any stripping or stuffing of containers performed in the port for the steamship companies at their piers and terminals or through direct contracting out (266 NLRB at 244, 277).

[3] "LCL" means "less than container load" and is used to denote a container in which the cargo of more than one shipper or consignee is consolidated. LCLs are also sometimes called "LTL loads" or "consolidated container loads." The term "FSL containers," on the other hand, means "full shipper loads" and denotes a container in which all of the cargo is owned by one shipper or consignee. See 266 NLRB at 241.

solidator in the port area, "it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates" (266 NLRB at 245).

Between 1962 and 1973 the restrictions on use of containers remained substantively unchanged. In 1962 contract bargaining the ILA again sought more restrictions on containerization, but the shipping companies rejected further restrictions, agreeing instead to establish a multimillion dollar, guaranteed income plan for ILA longshoremen (266 NLRB at 245).[4] In 1969 negotiations the parties bargained a contract clause and "Rules on Containers" which provided that LCL containers owned or leased by steamship companies which were to be stuffed or stripped within 50 miles of the port by other than the owner of the cargo were to be stuffed and stripped by ILA labor on the pier (266 NLRB at 245, 277). The 1969 contract provision and Rules remained basically the same under the parties' 1972 labor contract, but the steamship companies agreed to double the royalty paid on each container that passed over the pier intact (266 NLRB at 246, 278-279).

After maintaining basically the same restrictions on containers for eleven years, the parties' 1973 "Dublin Agreement" extended the Rules' coverage, for the first time, to "FSL containers" (i.e., "full shipper load" containers housing the cargo of only one shipper or consignee) (266 NLRB at 246). The new provision required that any stuffing and stripping of such containers within

[4] The guaranteed income plan negotiated in 1962 guaranteed 1600 hours of work for each regular longshoreman (Joint Appendix, pp. 162-163) and cost the steamship companies approximately $8,000,000 in the first year of that plan. See *Intercontinental Container Transport Corporation v. New York Shipping Association*, 426 F.2d 884, 888 (2d Cir. 1970). By the time of the 1969 agreement, each regular longshoreman received a guarantee of 2080 hours work per year (Ross, *supra*, 21 Lab. L.J. at 407), and in the year ending September 30, 1976 the guaranteed income plan cost the steamship companies $50,000,000 (Joint Appendix, pp. 162-163).

50 miles of the port must be performed by pier-side ILA labor (266 NLRB at 279).[5] The Dublin Agreement also required that shipping companies refuse delivery of their containers to those who violated the Rules and provided for the payment of liquidated damages ($1000 per container) to the ILA by steamship companies that provided containers to consolidators, warehouses or motor carriers who stripped or stuffed them in violation of the Rules (266 NLRB at 246, 280, 283).

The Rules were re-written in 1974 contract negotiations to reflect the changes contained in the Dublin Agreement (266 NLRB at 246, 281-283). Since then, the only change in the Rules' restrictions came in 1975, when the steamship companies agreed to eliminate the warehouse exception for export cargo and to limit the warehouse exception for import cargo (266 NLRB at 246-247, 284; see n. 5, *supra*). In 1977, however, the steamship companies agreed to another increase in the royalty payments to ILA for each container that crossed the pier intact (266 NLRB at 246, 285).

Thus, at present the Rules provide that if containers owned or leased by steamship companies are to be stuffed or stripped within 50 miles of the pier by anyone other than employees of the beneficial owner of the cargo, the stuffing and stripping must be done by ILA labor at the pier. Exceptions exist for FSL containers being transported intact to or from the beneficial owner and inbound FSL goods to be warehoused within the 50-mile area for at least 30 days. Finally, the Rules do not cover any container loads coming from or bound to points outside the 50-mile area (734 F.2d at 971).

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[5] Excluded from this new restriction, however, was the handling of FSL containers by employees of the beneficial owner of the cargo and by warehouse employees at bona fide public warehouses where the beneficial owner retained title to the cargo and paid storage fees for at least 30 days (266 NLRB at 246).

In summary, although the ILA initially sought significant restrictions on the use of containers in order to protect longshore jobs, what they settled for were limited restrictions but significant financial contributions by steamship companies (in the form of multi-million dollar income guarantees and royalties) to aid displaced longshoremen. Indeed, one commentator has concluded (Ross, *supra*, 21 Lab. L.J. at 418):

> Retrospectively, it would appear that the ILA's opposition to containerization was a tactical maneuver to secure even greater bargaining benefits. The results to the union and its members are impressive. . . . The winning of a guaranteed wage for 52 weeks a year in major ports for the life of the contract was an achievement of the highest magnitude. That this was accomplished in an industry dominated by intermittent employment and exposed to cyclical activity only adds lustre to the feat. At the same time, the union not only preserved its jurisdiction but extended it. These bargaining successes strengthened its leadership and had favorable repercussions on the bargaining structure on all coasts. In short, containerization and its associated labor issues were seized upon by the ILA as an opportunity to make gains on a wide front which strengthened the union at minimum cost.

D. *ILA-I*—Remand To The Board

In *ILA-I* this Court determined that the Rules and their enforcement would constitute lawful primary work preservation efforts by the ILA only if two criteria were met: (1) that the Rules and their enforcement seek to preserve traditional longshoremen's work rather than seeking to acquire other work for them, and (2) that the steamship companies who employ ILA labor, who have agreed upon the Rules and against whom the Rules are enforced, have the right to control the assignment of the work of stuffing and stripping those containers. Having determined that the Board incorrectly defined the "work

in controversy" in its earlier decisions,[6] this Court remanded the case to the Board for reconsideration of that issue and consideration of the "right to control" issue.

E. The NLRB Decision on Remand

On remand the Board defined the work in dispute as the work sought by the Rules: "the initial loading and unloading of cargo within 50 miles of a port into and out of containers owned or leased by shipping lines having a collective-bargaining relationship with the ILA" (266 NLRB at 236). The Board went on to hold that the ILA had an overall work preservation objective in negotiating the Rules and that the steamship companies had the right to control the assignment of container stuffing and stripping work. However, the Board found that the Rules had an illegal work acquisition objective as applied to two types of FSL container work in the land surface transportation industry (motor carrier "shortstopping" and traditional warehousing practices). The following is a summary of the Board's findings.

1. *Consolidation.* Both the Board and the Administrative Law Judge ("ALJ") found that the Rules could be legally applied to consolidation work—i.e., the loading or unloading of LCL containers. The ALJ found that consolidators competed directly with steamship companies with respect to this work, that this work had been diverted from the piers to consolidators by containerization and that the Rules claiming this work constituted a rational effort to return this work to the piers (266 NLRB at 252-254). The Board adopted these findings and held

[6] In its earlier decisions regarding the legality of the Rules, the Board had defined the work in controversy as the "off-pier stuffing and stripping of containers" and had concluded that the Rules were not valid work preservation agreements because the ILA had not traditionally performed off-pier stuffing and stripping. See *ILA-I*, 447 U.S. at 502-503. This definition was held erroneous as a matter of law because it would always operate to foreclose a finding of a legitimate work preservation objective (447 U.S. at 508).

the Rules lawful as applied to consolidators (266 NLRB at 235, 237).

2. *Motor Carriers and Shortstopping.* Prior to containerization, truckers picked up break bulk cargo at the pier and, if the cargo was destined beyond the port area or to multiple inland locations, they delivered the cargo to a terminal or freight station near the port where it was unloaded, sorted and re-loaded into over-the-road equipment for delivery. This activity is known as "shortstopping." After containerization, of course, the containers could be brought directly to the terminal where they, like the truck trailer before containerization, could be unloaded (266 NLRB at 255-256).

The ALJ found the Rules were unlawful as applied to shortstopping of FSL containers (266 NLRB at 255-256) because that practice was based upon the economics of surface transportation, including the larger capacity of long-distance trailers, the prevention of "dead head" runs with containers, the necessity of reloading cargo to comply with highway safety regulations, and the desire to avoid additional *per diem* charges on containers (*id.*). More specifically, the ALJ found that the cargo handling associated with shortstopping pre-existed containerization, was not created or increased by containerization and was not fairly claimable by the ILA (*id.*).

The Board adopted the ALJ's conclusion that the application of the Rules to shortstopping had an illegal work acquisition motive, but it relied on the fact that "after containerization, some of the traditional loading and unloading work of the longshoremen, which had historically been duplicated by trucking . . . employees, essentially was eliminated" (266 NLRB at 237).

3. *Warehousing.* The Board adopted the ALJ's finding that the Rules could be lawful or unlawful with respect to warehouse work, depending upon the circumstances. The ALJ found that the public inland warehouse "has al-

ways provided an intermediate freight distribution service whereby cargo could be stored for a term dictated by the owner's market demand" and that the container did not change the method of handling freight except that the truck trailer equipment was supplanted by a container (266 NLRB at 257). Thus, he found that when warehouses stripped incoming FSL containers and stored the cargo for indefinite periods as dictated by owner demands, or when they stored inventoried goods for owners and stuffed containers with those goods for shipment when the owner directed, they were serving functions that were not created by containerization, those functions posed no threat to historic ILA work and the ILA's efforts to acquire that work were unlawful (266 NLRB at 257-259). However, where warehouses merely serve as stripping or stuffing stations for cargo, the Rules could be legitimately applied because the "[p]rovision of such services by warehousemen is tantamount to the establishment of offshore container stations in competition with those at dockside and constitutes an incursion on ILA labor not justified by pre-container warehousing practices" (266 NLRB at 257).

The Board adopted the ALJ's findings and conclusions regarding the Rules' application to warehousing, but found that the illegal work acquisition object of the Rules and their enforcement stemmed from the fact that the new container technology had eliminated the duplicative work of longshoremen as a step in the cargo handling process (266 NLRB at 236-237).

4. *Right To Control.* The ALJ and Board both concluded that the steamship companies, who owned or controlled all the containers to which the Rules apply, could control the assignment of stripping and stuffing work because they could simply require in their leases of containers that their lessees have them stuffed and stripped at the pier with ILA labor (266 NLRB at 234, 260-261).

Accordingly, the Board held that those parts of the Rules that sought only to preserve traditional longshoremen's work could be lawfully enforced against the steamship companies.

F. The Court of Appeals Decision

The Fourth Circuit found that the Rules were legal in all respects and refused to enforce the Board's orders (734 F.2d 966). The court held that the Board erred as a matter of law in concluding that, as applied to shortstopping and traditional warehouse functions, the Rules had an unlawful work acquisition motive (734 F.2d at 979). According to the court, that conclusion could only be supported by a finding that the Rules deprived truckers and warehousemen of their work, a finding nowhere specifically made by the Board (*id.*). The Fourth Circuit also agreed with the Board's conclusion that the steamship companies had the power to control the assignment of stuffing and stripping work by reason of their ownership of the containers and, accordingly, that the Rules and their enforcement were lawful.

SUMMARY OF ARGUMENT

The Board was clearly correct in deciding that the ILA may not lawfully seek to acquire container handling associated with shortstopping and basic warehousing work. It is true that such work is physically like the work traditionally done by longshoremen, but it is functionally unrelated to the shipment of goods by sea. Loading break bulk cargo on railcars in Denver or warehousing it in Des Moines is also physically like the work of longshoremen, but because it has nothing to do with sea travel, no one, including the ILA, claims that work. The Board was therefore correct in concluding that the same is true of container loading and unloading within 50 miles of a port when that work relates to traditional inland cargo handling or transport rather than overseas transport.

Further, the Court of Appeals was just as clearly wrong in requiring a specific finding that inland employees would be deprived of work, because such a finding is not legally necessary and, in any event, such employees will undoubtedly be deprived of work.

The Board's conclusion is further supported by the Act's basic secondary boycott prohibitions, which, if properly applied, render the Rules and their enforcement totally invalid. And this conclusion is true even if one assumes (incorrectly) that the work sought by the Rules is traditional longshore work. Specifically, the Board and court below became so mired in questions relating to traditional longshore work that they overlooked the basic principles of the Act's secondary boycott provisions and superficially analyzed the "right to control" doctrine. Both found that the steamship companies own the containers and, therefore, that they can control the assignment of container work by refusing to continue leasing containers to those who actually control that work assignment unless the latter agree to assign the work to ILA labor. The trouble with that holding is that it defines a classic secondary boycott violation rather than the facts necessary to meet the "right to control" test. Under the latter doctrine, an employer must have the power to assign work without first disrupting a business arrangement with another in order to gain that work assignment power. However, the Rules in this case pressure the steamship companies first to cease doing business with those who control the container work so that the latter will cede the work to the docks. Accordingly, even if the Rules have an ultimate work preservation objective, they have "an" object of disrupting a business arrangement. As such, the Rules and their enforcement violate Sections 8(b)(4)(B) and 8(e) of the Act.

Finally, too much emphasis has been placed in this case on the negotiated Rules, and not enough on the bargaining between the ILA and steamship companies that has

produced legitimate, primary, economic protection for displaced longshoremen through royalty payments and guaranteed income plans. Collective bargaining is not well served by disregarding the massive financial contributions steamship companies have agreed to make in exchange for the free use of container technology and by now legitimizing the ILA's efforts to gain work which, if it ever was ILA work, was lost years ago.

ARGUMENT

A. The Board Correctly Held That The Rules Do Not Have A Lawful Work Preservation Objective As Applied To Shortstopping And Traditional Warehousing Functions

The Court of Appeals rejected the Board's conclusion that the Rules had an unlawful work acquisition objective as applied to shortstopping and traditional warehouse functions for the sole reason that there was no specific factual finding that the ILA's efforts to obtain this work would actually deprive truckers and warehousemen of their off-pier work. According to the court, the longshoremen's work would merely duplicate the off-pier work of these inland workers and, hence, would not diminish or eliminate their work (734 F.2d at 979). As we show below, the Board's determinations were correct for at least three reasons, and its orders based on those determinations should be enforced.[7]

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[7] Although the Chamber supports the Board on these findings, it does not agree with the Board's determination that the Rules had a lawful work preservation objective as applied in other contexts. For example, the Chamber questions how the Rules can lawfully be applied to any FSL container work when the Rules do not apply to FSL containers stuffed or stripped by employees of the beneficial owners of cargo (presumably because this was not traditional ILA work). There is no reason that such work should suddenly be converted to traditional longshore work merely because the beneficial owner chooses to subcontract the work to consolidators, warehouses or motor carriers. In addition, the Chamber agrees with the Ameri-

First, contrary to the Fourth Circuit's reasoning, the Chamber is aware of no requirement that other employees actually have to be deprived of work before an unlawful work acquisition motive can be found. Indeed, the law is to the contrary. For example, in *Associated General Contractors of California v. NLRB*, 514 F.2d 433, 436 (9th Cir. 1975), the union claimed that its contractual work preservation clause required the subcontractor to permit union members to dismantle and refabricate the piping on prefabricated sinks that were to be installed at the jobsite. Although the union obviously sought only to duplicate the work of employees of the sink manufacturer, the court had no trouble finding that the union had a secondary objective because it "was trying to acquire work performed by employees of [the sink manufacturer]" (514 F.2d at 438). By the same token, it was clearly error for the Fourth Circuit in the instant case to foreclose a "work acquisition" finding on the ground that the ILA merely sought to duplicate the off-pier work of truckers and warehousemen.[8]

Second, even if work deprivation were a necessary element for finding a work acquisition objective, it is clear

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can Trucking Association's contention that none of the work sought by the Rules is functionally and historically related to traditional longshore work because the work has been integrated into an intermodal transportation system.

[8] In addition, of course, it can be said with some legitimacy that the phrase "work acquisition," like other terms used in the area of secondary boycott law (e.g., "work preservation"), is really just a label used by the Board and courts to denote the conclusion that the work in question may not permissibly be claimed by the boycotting union. In this regard, it appears that in the *ILA-I* decision this Court specifically contemplated that on remand the Board might find the Rules unlawful because the longshoremen's work at the pier "has been completely eliminated" (447 U.S. at 511-512). If a finding of work elimination (the Board's underlying premise) is sufficient to render the Rules unlawful, then it matters not whether the Board labeled the Rules "work acquisition" as a result of that finding.

that such deprivation will, in fact, result in this case. The Fourth Circuit recognized that longshoremen's work at the pier would merely be an unnecessary duplication of the work of truckers and warehousemen (734 F.2d at 979), and it was obviously troubled, as were some members of this Court earlier, by this "invidious form of 'featherbedding.'" See 447 U.S. at 526-527 (dissent). Unlike the Board, however, the appellate court failed to appreciate the logical and inevitable implications of these facts. On the contrary, the court simply assumed that because such duplication could occur, it would occur. However, economic and competitive reality dictates a different result.

Cargo handling, of course, is an expensive proposition, both in terms of paying for the work and in terms of the possibility of pilferage, loss and damage to the cargo during each handling. Indeed, containerization technology developed and flourished in part because it decreased the necessity for such handling (see 447 U.S. at 494-495). Faced with the Rules' mandate that cargo shortstopped or warehoused within 50 miles of the pier *must* be handled on the docks, the rational business person will develop alternative practices and procedures to avoid the costs involved in duplicative handling. For example, shippers may choose to have their cargo handled *only* at the docks if they must pay (both in terms of labor costs and cargo losses) to have it handled there in any event. Alternatively, shippers may decide to have their cargo warehoused or shortstopped outside the 50-mile limit or, if possible, to avoid those services entirely. Finally, by way of example, shippers with slim profit margins who cannot economically avail themselves of these alternatives may choose to cease importing or exporting completely.

Although there may be other examples of shipper adjustments to avoid the duplicative costs imposed by the Rules, they would all, we submit, share one common feature in a competitive economy such as ours: a removal

of duplication at the only place it can be removed under the Rules—i.e., the warehouses and trucking stations within the 50-mile limit.[9] As a result, the Fourth Circuit was clearly wrong in holding that there could be no work acquisition objective here because the Rules as applied to shortstopping and warehousing would not deprive truckers and warehousemen of work.

Third, the Board's work acquisition determinations were correct because the stuffing and stripping in issue are not "functionally and historically" related to traditional longshore work in the sense intended by this Court's decision in *ILA-I* (447 U.S. at 510). The ALJ addressed the standards enunciated by this Court when he stated (266 NLRB at 256; footnote omitted):

> [T]he practice of shortstopping is rooted in traditional motor carrier transport cargo handling procedure, which is performed by motor carriers for their own benefit and convenience . . . [and which] has no relevance to the marine leg of the intermodal [transportation] network. Although skills utilized therein are indistinct from those of deep sea longshoremen in the performance of their traditional duties, it is work assumed for a different purpose, and in a different segment of the transportation industry. Short-stopping is simply a carrier-oriented, as distinguished from consumer-oriented, service, and as such neither competes with marine cargo handling nor amounts to a subterfuge to oust longshoremen of their traditional work. To this extent, upon delivery of a container to a motor carrier, the seaborne leg ends, the container becomes a substitute for the trailer or van, and work beyond this interface was neither created by containerization nor does it make inroads on that traditionally made available to deep sea ILA labor by marine operators.

[9] In *Retail Clerks Union, Local 770, AFL-CIO*, 145 NLRB 307 (1963) (*"Retail Clerks"*), the in-store employees' union, claiming a work preservation object, sought the work of stocking merchandise performed by the employees of independent rack-jobbers. The Board recognized that the demands of the in-store union could be met by simply allowing its members to redo the rack-jobbers' work. However, the Board concluded that the increased costs associated with that duplication made it likely that the store owners would change their arrangements with rack-jobbers instead and, accordingly, that the union had an illegal cease doing business object.

Similarly with respect to warehousing (266 NLRB at 257-258), the ALJ found that the Union could not claim container handling which is integrated into "traditional warehouse functions" (e.g., indefinite storage, inventory services, special cargo handling or packaging, etc.) for the following reasons (266 NLRB at 257):

> [T]he container afforded no change in the warehousemen's method of handling inbound freight, but simply reflected a change in equipment through which the truck trailer was supplanted by the container.
>
> The container-handling services afforded by warehousemen as outlined above are and have been integrated into a surface system of transportation which was not created by containerization, and poses no threat to the historic work jurisdiction of the ILA.

In short, the ALJ found that where ILA work had not been diverted from the piers, the physically similar work of inland employees which pre-dated containerization and was not changed by that technology could not be legitimately claimed by the ILA.

These analyses, we submit, are the essence of the "functional and historic relationship" test envisioned by this Court in 1980.[10] The functional relationship between

[10] Although the ILA has apparently contended that this Court's earlier decision forecloses consideration of work patterns in inland transportation industries, the Chamber believes that this is a far too restrictive reading of *ILA-I*. Indeed, this Court directed the Board to consider the "traditional work patterns" that the ILA seeks to preserve (447 U.S. at 507) and noted that the legality of the Rules would depend on how closely they are tailored to preserv-

traditional longshore work and the inland employees' cargo handling is nil—i.e., the work is pursued for different purposes in different segments of the intermodal transportation system. The historical relationship is similarly non-existent—i.e., the longshoremen never performed work of this nature in the past.

Moreover, this analysis formed the fundamental predicate for the Board's finding that the longshoremen's work was eliminated with respect to shortstopping and traditional warehouse practices. The Board phrased its conclusion in terms of elimination of longshore work rather than in terms of the fact that containerization did not change the work of truckers and warehousemen. Nevertheless, the underlying premise is the same: since work has not been diverted to the inland employees and since there is no additional handling necessary at the pier, the longshoremen's work has been eliminated. Thus, the Board's conclusion is premised upon an analysis that fully incorporates the standards enunciated by this Court,[11] and the Fourth Circuit's contrary judgment should be reversed.

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ing "the essence of the traditional work patterns" (447 U.S. at 510 n. 24). Such "patterns," we submit, cannot be ascertained in a vacuum. Rather, the contours of the ILA's traditional work patterns can be determined only by evaluating the cargo handling responsibilities of longshoremen *and* land surface personnel before containerization developed and by considering how containerization changed those responsibilities. Indeed, we think the Court contemplated this kind of comparative analysis when it admonished the parties that the appropriate analysis requires more than simply deciding whether a container is more like a ship's hold or more like a big box (447 U.S. at 509 n. 23).

[11] Inexplicably, both the Board and the Fourth Circuit stated that the ALJ had found that work claimed by the Rules with respect to shortstopping was functionally related to traditional longshore work (see 266 NLRB at 235; 734 F.2d at 976). No such finding was ever made by the ALJ, and in fact, his discussion of shortstopping quoted in the text shows that he did *not* find the work to be functionally related to traditional longshore work. The Board apparently meant that the ALJ had found the basic elements of the shortstopping work to be *physically* similar to longshore work—which he did (266 NLRB at 256). However, it seems clear that this Court did not intend the work preservation analysis to turn on the physical aspects of the work in question. *See* 447 U.S. at 509 n. 23. Accordingly, the Board's misstatement of the ALJ's finding should have no impact on the outcome of this case.

B. The Board's Order Should Also Be Enforced Because The Steamship Companies Did Not Have The Right To Assign Any Of The Work Sought By The Rules [12]

The Board and court below, like other tribunals that have considered the legality of the Rules, became so caught up in the complexity of determining what was traditional longshore work that they apparently lost sight of the Act's basic secondary boycott principles. Specifically, both found that the Rules had an overall and ultimate work preservation objective (266 NLRB at 236; 734 F.2d at 978), but they failed to look further to determine whether the Rules and their enforcement revealed other, unlawful, secondary objectives. And that oversight seems to have been the result of their misapplication of the "right to control" doctrine. Accordingly, we turn here to basic secondary boycott principles as we understand them.

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[12] We recognize that this argument may technically go beyond the limited issues on which this Court has granted certiorari in this case in the sense that acceptance of our position on the "right to control" doctrine would invalidate the Rules totally, not just in the limited areas found by the Board. However, this Court in *ILA-I* specifically directed the Board to deal with this issue on remand. Further, our argument here clearly provides additional support to the Board's position before this Court that the Fourth Circuit's decision should be reversed. Finally, this Court now has pending before it petitions for certiorari by other parties in this case which specifically raise the right to control issue (e.g., Case Nos. 84-677, 84-691 and 84-696), and the Board (whose petition is now being considered) has urged this Court to grant those pending petitions in order to resolve all issues relating to the Rules and their application (see Petition of the NLRB in Case No. 84-861 at 22, n. 8 and accompanying text).

Section 8(b)(4)(B) prohibits secondary boycotts, including a union's use of threats, coercion or restraints against one employer where "*an*" object of that conduct is to convince that threatened employer to cease doing business with another employer,[13] normally so that the latter employer will resolve its dispute with the threatening union. See, e.g., *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612 (1967) ("*National Woodwork*"); *NLRB v. Pipefitters*, 429 U.S. 507 (1977) ("*Pipefitters*"); *Retail Clerks, supra; International Longshoremen's Association, supra*, 137 NLRB 1178. That section, however, prohibits only "secondary" cease doing business objects, and does not prohibit a strike or picketing of an employer with whom the picketing union has a dispute, even though the incidental effect of that picketing is to cause others to cease doing business with the picketed employer.

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[13] Even if a union's conduct has some lawful objectives, the conduct is illegal if *one* of its objects is the cessation of business. *NLRB v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675, 688-689 (1951).

In addition, it is clear that 8(b)(4)(B) is violated even if an object of the union is something less than a total cessation of business. Indeed, where an object is a change in a business relationship, the 8(b)(4)(B) "cease doing business" requirement is met. Accordingly, the fact that steamship companies in the instant case can fulfill the ILA's desires by simply changing their leases to require that containers be stuffed and stripped by pier-side ILA labor is of no moment, for such a change constitutes a "cessation of business" within the meaning of 8(b)(4)(B) and 8(e). *NLRB v. Operating Engineers*, 400 U.S. 297 (1971); *Retail Clerks, supra*; *International Longshoremen's Association*, 137 NLRB 1178 (1962), *enf'd in relevant part*, 331 F.2d 712 (3d Cir. 1964). Further, of course, the Rules at issue in this case specifically provide that the steamship companies are totally to cease leasing containers to consolidators and deconsolidators and to any others who do not ensure that stuffing and stripping are done by pier-side ILA labor (266 NLRB at 246, 282). That objective, even if it is only an alternative to the steamship companies changing their lease terms, still violates Sections 8(b)(4)(B) and 8(e). E.g., *Retail Clerks, supra.*

For example, a union may picket employer "X" in furtherance of its demands for higher wages in a new labor contract, even though that picketing may cause X's supplier ("Y") to cease delivering supplies to X. In those circumstances, it is presumed that the union's object is to convince X (who has the power directly to grant wage increases) to settle its dispute with the union, and that the cessation of Y's business with X is but an incidental effect of the union's picketing. However, that same union may not picket Y in order to cause it to cease doing business with X, even though the union's ultimate objective is primary and lawful—the settlement of the union's primary wage dispute with X. That result obtains because Y (who has no power to raise the wages of X's employees) cannot resolve the union's dispute. Under these latter circumstances, "an object" of the union's picketing is illegal—that is, the cessation of business between Y and X—and that picketing is not made legal simply because another of the union's objects (its ultimate object) is lawful.

Section 8(e) of the Act prohibits the same kind of secondary objective, but substitutes an agreement between a neutral employer and a union for the threats, coercion or restraint prohibited by Section 8(b)(4)(ii)(B). *National Woodwork, supra.* For instance, if the union in our example above declined to picket Y, but instead obtained an agreement from Y to cease doing business with X, then Section 8(b)(4)(ii)(B) would not be violated because the union engaged in no prohibited conduct. However, Section 8(e) would be violated because Y and the union would have entered into an agreement with "a" secondary cease doing business objective—and that conclusion applies even though the union's ultimate object was the lawful and primary desire to resolve its dispute with X. E.g., *National Woodwork, supra; Pipefitters, supra.*

Thus, the key to an 8(b)(4)(B) or 8(e) violation is that "an" object of the union's conduct or agreement is to convince a neutral employer (who does not have the ability to meet the union's demands) to cease doing business with another employer who can meet the union's demands. And from the earliest days of the Board's consideration of secondary boycott cases, that same analysis has applied in the form of the right to control doctrine in so-called work preservation cases, such as the instant case.[14]

The Board's analysis, of course, has been confirmed by the decisions of this Court. In *Pipefitters*, *supra*, a plumbing subcontractor was awarded a contract by a general contractor to install factory pre-piped, climate-control units on a construction jobsite. Traditionally, the plumbing union that represented the subcontractor's em-

[14] For example, in *Retail Clerks, supra,* Local 770 had a labor agreement with an association of market employers. That agreement provided that all clerks' work performed on store premises would be performed by bargaining unit employees. The market owners purchased goods from distributors ("rack-jobbers") who, under their agreements with the market owners, placed, replenished and arranged their goods on the market shelves. The clerks' union struck the market owners, claiming the work done by the distributors was theirs (the clerks'), and defended secondary boycott charges on the ground that they were simply seeking to preserve traditional bargaining unit work. The Board concluded that the clerks' strike violated what is now Section 8(b)(4)(B). The Board held that even though the markets owned the stores and, accordingly, could have controlled access to the work to ensure that all "clerks' work" was assigned to their (the markets') employees, it was necessary for the markets to first alter or terminate an existing business relationship with the distributors before they (the markets) could assign the work to their employees. Thus, the union's strike, although ultimately aimed at preserving unit work, sought that work from employers (the markets) who did not have the power to assign it without first disrupting a business relationship. Accordingly, "an" object of the strike was prohibited and Section 8(b)(4)(B) was violated. See also *International Longshoremen's Association, supra,* 137 NLRB 1178.

ployees had performed all pipe fitting on construction jobs. When the pre-piped units arrived on the jobsite, the union-represented employees refused to install them (struck) until and unless they were given the task of threading, cutting and connecting all pipes in the units. This Court affirmed the Board's finding of an 8(b)(4)(B) violation. Although the plumbing union's ultimate object may have been to preserve work for its members (429 U.S. at 521 n. 8 and accompanying text), where the union's members struck their plumbing subcontractor employer who did not control the work assignment, "*an*" object of that strike was to pressure the subcontractor to pressure, in turn, the general contractor so that the latter would cause the piping work to be assigned to members of the plumbing union. And that object, which directly sought a change in the business relationship between the plumbing subcontractor and the general contractor, was violative of 8(b)(4)(ii)(B).[15]

Pipefitters distinguished the Court's earlier decision in *National Woodwork*, where the Court had held that the carpenters union could lawfully pressure a subcontractor

[15] See 429 U.S. at 514 ("[The union] was exerting prohibited pressure on [the plumbing subcontractor] with *an* object of either forcing a change in [the general contractor's] manner of doing business or forcing [the plumbing subcontractor] to terminate its subcontract with [the general contractor]." (Emphasis added.)); 428 U.S. at 528 and n. 16 ("The issue is whether 'an object' of the inducement and the coercion was to cause the cease-doing-business consequences prohibited by § 8(b)(4) . . . . There are circumstances under which the union's conduct is secondary when one of its purposes is to influence directly the conduct of an employer other than the struck employer. In these situations, a union's efforts to influence the conduct of the nonstruck employer are not rendered primary simply because it seeks to benefit the employees of the struck employer."). See also *ILA-I*, 447 U.S. at 504-505 (If an employer pressured by a union to preserve the work of its members does not have the right to give employees the work in question, "it is reasonable to infer that [the union] has *a* secondary objective, that is, to influence whoever does have such power over the work." (Emphasis added.)).

to assign its employees the work of finishing doors on the jobsite even though the incidental effect of that work assignment would be the subcontractor's cessation of business with the manufacturer of pre-finished doors. The difference, according to the *Pipefitters* Court, was that in *National Woodwork* "the struck [subcontractor] . . . was faced with the choice of either giving the cutting and fitting work to its own employees or giving it to the door manufacturer" (429 U.S. at 528 n. 16). Thus, although the incidental effect of that work assignment was that the subcontractor would cease doing business with the door manufacturer, the union did not need to put pressure on the manufacturer or any employer other than the primary carpentry subcontractor to gain its sought-after work assignment. Under these circumstances, the Court had sustained the Board's finding that "the union's *sole* object" was to influence the carpentry subcontractor "to give the work to its own employees" (429 U.S. at 528 n. 16; emphasis in original).

This case fits squarely within the *Pipefitters* category.[16] Here it is the owners of goods being shipped, or their agents, who specify where and by whom containers will be stuffed and stripped (see n. 1, *supra*). Indeed, the ALJ, the Board and the court below did not dispute the contention that "it is . . . the shipper, importer, or their agents, not the steamship companies, . . . who specify the manner in which the containerized cargo is transported both on its seaward and surface journeys, as well as who strips and stuffs containers" (266 NLRB at 261).

Despite this fact, both the Board and court found that the steamship companies had the ultimate right to control the assignment of work because they own the containers and can require, in their leases, that they be

[16] We assume, for the sake of this argument only, that the work sought by the ILA is traditional longshore work that it can lawfully seek to preserve for its members. This assumption, of course, is not true, at least as to shortstopping and traditional warehousing work.

stuffed and stripped by ILA labor at the pier (266 NLRB at 234,; 734 F.2d at 978). This "analysis" under the right to control doctrine, we submit, is wrong as a matter of law. The issue under the right to control doctrine is who controls the assignment of work, not (as the Board and court concluded) who has the economic or business muscle to wrest that control from another.[17] Here the steamship companies admittedly own the containers, but that fact means only that they are in a monopolistic position and able to exert market power by withholding containers from those who do not do as the ILA demands.[18] The ILA's pressure on the steamship companies clearly is *not* to force those companies to buy their container handling labor from the ILA rather than from warehouses, motor carriers and consolidators—which was the case in *National Woodwork*—because it is shippers, not steamship companies, who are buying labor from these inland companies. Like the union's pressure in *Pipefitters*, the ILA here is pressuring the steamship companies to cease renting containers to inland freight-handlers so that the latter will agree to have the containers stuffed and stripped by longshoremen on the dock. Thus, the ILA's object here is no more lawful than was the union's object in *Pipefitters*.

[17] The Board and Circuit Court also rejected the claim that the requirements of the Federal Maritime Commission precluded steamship companies from conditioning the lease of their containers on the lessee's use of ILA labor to strip and stuff them. The Chamber does not address this issue because it is our contention that, even if no such requirements bind the steamship companies, they still do not control container work assignments in the sense necessary to protect the ILA's Rules and their enforcement from a finding that they violate Sections 8(b)(4)(B) and 8(e) of the Act.

[18] In *Pipefitters, supra*, the Court noted that the union's pressure could effectively regain piping work for its members because the union controlled the labor supply in the construction market and no pre-piped units could be installed without the union's assistance (429 U.S. at 524 n. 12). Nonetheless, the union's refusal to install the pre-piped units was found violative of Section 8(b)(4)(B).

This result does not change because of any vague notions that the steamship companies are "offending employers" even if they don't control assignment of the work. For example, contrary to the ALJ's suggestion, the ILA's objectives do not become primary merely because the shipping companies' practice of charging less to handle consolidated goods than break bulk cargo may have had the effect of diverting stuffing work from their employee unit (266 NLRB at 253-254). Clearly it costs those companies less to handle containers, and the more rapid loading and unloading of containers to and from ships increases the utilization of those companies' ships (266 NLRB at 232). Thus, the lower charge simply reflects economic reality, not a hidden scheme to deprive ILA labor of work.

Similarly, the ILA's secondary objective cannot be converted to a primary objective based upon the contention that the business relationships involved in the steamship companies' rental of containers to shippers and their agents developed in contravention of the Rules. Aside from the fact this contention, if true, would not validate the Rules,[19] the facts discussed earlier in this brief reveal that these business relationships evolved as the ILA acquiesced in their development. In particular, the facts show that from 1958 (when the ILA knew that containerization threatened traditional ILA work) through 1962, the ILA agreed to the free use of containers. Further, from 1962 until 1973 the ILA, in exchange for

[19] In most "right to control" cases the business relationship sought to be disrupted by a union develops in contravention of the union's claims to traditional work. Indeed, the relationship normally develops in direct conflict with a specific contractual claim by the union to the work in issue. See, e.g., *Pipefitters, supra*; *Retail Clerks, supra*. Despite that fact, the union's pressure to disrupt that relationship violates 8(b)(4)(B), at least as long as other persons (here the shippers or their agents) continue to insist upon controlling the work assignment. E.g., *IBEW, Local 501 (Atlas Construction Company)*, 216 NLRB 417 (1975), *enf'd*, 566 F.2d 348 (D.C. Cir. 1977).

royalty and guaranteed income commitments, agreed to limited restrictions on consolidated containers only. Thus, the ILA basically agreed for close to fifteen years that the steamship companies could lease their containers to others to be stuffed and stripped away from the port by labor selected by the shipper, the warehouse, the trucking company, or their agents. And it was in this atmosphere that the business of leasing containers developed. See, e.g., Joint Appendix, pp. 55, 56, 68, 87, 135.

In conclusion, the Rules and their enforcement are directed at steamship company employers who do not control the assignment of container stuffing and stripping work. As such, they violate Sections 8(b)(4)(B) and 8(e) of the Act. The ILA may be free to demand of steamship companies the traditional longshore work those companies have the power to assign, but the ILA may not pressure those companies to disrupt business relationships to capture from others the right to assign work to ILA longshoremen. This conclusion is not only correct in law, but it makes sense in practice—it returns ILA labor to its traditional task of loading ships with cargo as it comes to them and it allows steamship companies and the ILA to devise ways in which to compete in the market place (rather than in the courts) for that work.

C. Collective Bargaining Considerations Support A Reversal Of The Circuit Court's Decision

This Court stated in *ILA-I* that judgments concerning the legality of the Rules should take into account that they are the product of collective bargaining, and that Congress has shown a preference for bargaining as "the method for resolving disputes over dislocation caused by the introduction of technological innovations in the workplace" (447 U.S. at 511). Congress has not, however, shown a preference for the bargaining of illegal 8(e) agreements which disrupt existing business relationships. Indeed, Congress has outlawed such bargains. Accordingly,

if the Rules have a secondary object, they should not be judged less harshly merely because they were collectively bargained. *Local 1976, U.B.C. & J. v. NLRB (Sand Door)*, 357 U.S. 93 (1958).

Nevertheless, collective bargaining of *lawful* agreements is the preferred method of resolving most labor disputes, including those over dislocations resulting from technological innovations. Upholding the legality of the Rules in this case, however, will discourage, rather than promote, such legitimate bargaining. We illustrate with two examples.

Since 1962, when only limited restrictions on consolidated container loads (LCL) were bargained, the steamship companies have agreed in bargaining to extensive financial contributions in the form of royalty payments and multi-million dollar work guarantees to cushion the loss of longshore work resulting from containerization. In fact, although the Board held to the contrary (266 NLRB at 234, 259-260), it appears that the ILA knowingly abandoned any claims it may have had to the stuffing and stripping of FSL containers (which were untouched by the Rules until 1973) in exchange for financial commitments from steamship companies to longshoremen.[20] Having reached that accommodation, it would disserve the bargaining process to hold now that the ILA may renege on its earlier bargain, attempt to capture that work and, in the process, reduce the value of steamship company investments in containers and dislocate countless business relationships and employment opportunities that developed over at least a 15-year period. Indeed, to allow such belated work captures may act as

[20] See, e.g., *Intercontinental Container Transport Corporation v. New York Shipping Association*, 426 F.2d 884, 888 (2d Cir. 1970); *International Longshoremen's and Warehousemen's Union (California Cartage Company, Inc.)*, 208 NLRB 994, 996 (1974), *enf'd mem. sub nom. Pacific Maritime Association v. NLRB*, 515 F.2d 1018 (D.C. Cir. 1975).

a substantial disincentive to bargaining by employers in other industries undergoing technological change. Specifically, an employer will have little incentive to fund job or income guarantees, supplemental unemployment benefits, early retirement plans or other financial aids to its employees who may be displaced by technology important to that employer's future, when, years later, those employees may enforce a demand that their employer discard its investments in technology and return lost or even new work to them.

Finally, there is another way in which bargaining in the longshore industry may legitimately serve the interests of the ILA and the steamship companies. Container stuffing and stripping, like most businesses, is competitive on the basis of price and quality. Presumably most stuffing and stripping is now performed away from the pier because the consolidators, truckers and warehousemen who perform that work can do it cheaper, faster and/or better than ILA labor at the pier. If the ILA and those who employ its members want that work, they may bargain special labor agreement provisions that will enable them to win the competition for that work. Certainly such bargaining is preferable to the present attempt by the ILA to gain work by directly disrupting business relationships that have developed over the years. And, we submit, Congress recognized that reality when it enacted the Section 8(e) and 8(b)(4)(B) prohibitions against enforcement of such disruptive agreements.

CONCLUSION

For the foregoing reasons we respectfully submit that the Fourth Circuit's decision in this case should be reversed and the Rules on Containers and their enforcement should be declared violative of Sections 8(e) and 8(b)(4)(B) of the Act.

Respectfully submitted,

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